No. 88-1138

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DELTA AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL,
Respondent,

and

EUGENE R. BLACK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS CHARLES G. CRISWELL, *et al.* IN OPPOSITION

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February 1989

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the successorship doctrine was properly applied to require the continued employment of 15 pilots who were already working as flight engineers past age sixty pursuant to the Final Judgment and Permanent Injunction in *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985).

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BRIEF FOR RESPONDENTS CHARLES G. CRISWELL, *et al.* IN OPPOSITION

Respondents Charles G. Criswell, *et al.*[1] respectfully pray that the Petition for a Writ of Certiorari of Delta Air Lines, Inc. ("Delta") be denied.

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[1] The other respondents are: Eugene R. Black, Ernest F. Ellis, Arlie A. Gillespie, Peter T. Hoffman, Jack L. Keyes, Ben D. Laubacher, Jr., Robert A. Longwell, Alan L. McLaren, Phil G. Most,

COUNTERSTATEMENT OF THE CASE

The Court of Appeals correctly summarized the history of the case as follows (A. 2a):

> This action had its genesis more than ten years ago when pilot Charles Criswell, and two other plaintiffs, were forced to retire at age 60 by Western Air Lines ("Western"). A jury found that Western had violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ["ADEA"], when it (1) refused to allow DC-10 captains nearing the age of sixty to down-bid to the position of second officers (flight engineers), and (2) imposed a mandatory retirement age of sixty on second officers as a matter of company policy. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981). Final judgment and a permanent injunction were issued on May 13, 1981 by Judge Tashima.
>
> This court affirmed the district court's decision. 709 F.2d 544 (9th Cir. 1983). A unanimous Supreme Court affirmed. 472 U.S. 400 (1985).

The March 13, 1981 *Criswell* injunction, attached to and incorporated by reference in the district court's successorship order (A. 8a) but omitted from Delta's Appendix, is included in the Supplemental Appendix to this opposition (S.A. 1a). The *Criswell* systemwide injunction reads in relevant part (S.A. 4a-5a):

> Western, its officers, agents, servants, employees, and attorneys and all persons in active concert or participation with it who receive actual notice of this Final Judgment and Permanent Injunction and Western's successors and assigns, are hereby permanently enjoined from:
>
> (a) Refusing or failing to permit its flight deck crew members to work or continue to work as second officers after age 60 for any reason based on age.

Lynn M. Norton, Glen P. Shannon, Donald C. Thompson and Henry J. Wiegand. Robert P. Elliott was an appellee below but Delta did not petition as to him.

(b) Refusing or failing to consider or act favorably upon downbids by captains or first officers for second officer positions for any reason based on age.

(c) Continuing to enforce its policy of requiring all flight deck personnel, including second officers, to retire at age 60.

(d) Any further violation of Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a).

Respondent Criswell was reinstated after trial in 1981 (C.R. 421(a) at 2). Five of the respondents were reinstated in related litigation, *Stone v. Western Air Lines, Inc.*, 34 Empl. Prac. Dec. [CCH] ¶ 34,351 (C.D. Cal. 1984); *see Stone v. Western Air Lines, Inc.*, 39 Empl. Prac. Dec. [CCH] ¶ 35,908 (C.D. Cal. 1985), and the remaining respondents turned age sixty and continued as flight engineers after the 1981 *Criswell* injunction became finally effective following this Court's decision in 1985.

During the *Criswell* litigation, Delta supported Western's attempts to exclude from the cockpit pilots over age sixty. On November 15, 1984, Delta filed a brief *amicus curiae* in this Court in support of Western's position in *Criswell* (C.R. 421(c) Exh. A).

Western and Delta agreed to merge on September 9, 1986 (C.R. 421(c) Exh. F at I-1). Stockholder approval was secured on December 16, 1986 (*see* C.R. 425 at 3). Delta operated Western as a wholly-owned subsidiary thereafter until April 1, 1987, when Western ceased to exist as a corporate entity (C.R. 425 at 3).

In the merger Delta offered jobs to all Western employees below the officer level (C.R. 425 at 2). All Western pilots except respondents were to be hired as pilots (C.R. 428 at 3). By letter dated February 13, 1987, Delta advised respondents that it refused to provide them cockpit positions as Second Officers because

"Delta does not allow pilots disqualified from future service by the Age 60 FAR [2] or other reasons to serve in any cockpit positions." (C.R. 421(a) Exh. B). Delta did not attempt to sever the employment rights of any of the other approximately 1,500 Western pilots, including those who had exercised "hundreds of downbids in a wide variety of circumstances." *Criswell*, 514 F. Supp. at 392.

After the merger, the former Western flight operations remained separate and distinct from Delta's. Former Western pilots continued to fly former Western planes over former Western routes (C.R. 431 at 3-4 and Exhs. C-E), albeit under Delta's name. The pilot seniority lists were not yet merged and, until that took place, the "flight operations, equipment and routes of each company" were to remain separate (C.R. 431, Exh. E at 4). In its March 30, 1987 successorship order, the district court found that "Western's and Delta's flight operations will not be fully integrated until some time in the future" (A. 8a).

In opposing a finding of successorship in this case, Delta relied heavily on its "policy" against "two-step downbidding" that was in issue in *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1300 (1987). In this case, Delta made no independent evidentiary showing regarding its "policy." Instead, it relied upon the reported opinion in *Iervolino*. There is nothing in *Iervolino* to indicate that Delta had ever previously applied its policy to persons like respondents who were already in the flight engineer position after having attained the rank of Captain in the normal progression.

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[2] The FAA's "Age 60 Rule," 14 C.F.R. § 121.383(c). The rule applies to Captains and First Officers, but not to Second Officers or flight engineers. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 404 (1985).

Iervolino was a single-plaintiff case which challenged Delta's refusal to allow a Captain to "downbid" to flight engineer at age sixty. In *Iervolino*, Delta presented many defenses, only one of which was a restriction on downbidding. Not only did Delta claim, as Western did in *Criswell*, that to be younger than sixty was a "bona fide occupational qualification" for the Second Officer position for reasons relating to age, but Delta made repeated attacks on Iervolino's health throughout the trial. It was therefore impossible to conclude, given the general verdict, how or on what issues the jury decided the case for Delta. The trial court entered judgment on the general verdict. The Court of Appeals affirmed the denial of a motion *j.n.o.v.*, and concluded that the jury instructions were either correct, not objected to, or incorrect but harmless error. Delta never sought or obtained a declaratory judgment, and neither the jury nor the courts ever expressly upheld Delta's "policy."

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE SUCCESSORSHIP DOCTRINE

The Court of Appeals made a routine application of the successorship doctrine that has been developed in a series of labor law opinions in this Court[3] and has been applied uniformly in employment discrimination cases in the Courts of Appeals.[4] Although Delta states that it is

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[3] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Fall River Dyeing & Finishing Corp. v. NLRB*, 428 U.S. 427, 107 S. Ct. 2225 (1987).

[4] *Bates v. Pacific Maritime Ass'n*, 744 F.2d 705 (9th Cir. 1984); *Musikiwamba v. ESSI, Inc.*, 769 F.2d 740 (7th Cir. 1985); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974).

important for the Court to grant the petition because it has not decided a successorship case in the employment discrimination context, Delta does not dispute that the successorship doctrine applies in employment discrimination cases.

There is no conflict in the Circuits regarding the application of the successorship doctrine. The Ninth Circuit stated (A. 3a):

> In an employment discrimination action, there are three principal factors relating to successor liability:
>
> (1) continuity in operations and work force of the successor and predecessor employers;
>
> (2) notice to the successor employer of its predecessor's legal obligation; and
>
> (3) ability of the predecessor to provide adequate relief directly.

The above formulation is derived from *Bates*, 744 F.2d at 709-10, not cited in the petition. The *Bates* formulation is a condensation of the nine-part formulation in *Slack v. Havens*, 522 F.2d 1091, 1094-95 (9th Cir. 1975). Other circuits are in accord with this formulation. *Musikiwamba*, 760 F.2d at 750; *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d at 1094. Delta's petition presents no issue of importance or conflict regarding the Ninth Circuit's formulation of the successorship doctrine that warrants review by this Court.

II. DELTA'S "POLICY" DOES NOT CREATE AN EXCEPTION TO THE SUCCESSORSHIP DOCTRINE

Delta argues that its "policy" against "two-step downbidding" prevents the application of the successorship doctrine in this case. The Court of Appeals rejected Delta's argument as a matter of law, holding essentially that it was an impermissible collateral attack on the successorship doctrine itself (A. 4a-5a), and upheld the dis-

trict court's "highly fact-specific" successorship analysis (A. 5a-6a) which included consideration of Delta's "policy" as one of the equitable concerns to be taken into account. This treatment by the Court of Appeals is fully consistent with the way other courts have interpreted the successorship doctrine.

Delta's argument that Mr. Criswell should be forced to undergo another decade of costly litigation in a new action against Delta undermines the very purpose of the successorship doctrine. As the Court of Appeals explained (A. 4a-5a):

> Delta's argument ignores a basic tenet of successorship doctrine: the obligation imposed on the successor is preexisting. As this court noted in *Bates*, "[i]n successorship cases, it is necessary to distinguish between the necessity for finding discrimination in the first instance, and the enforcement of an already established obligation against a successor employer . . . . Successorship liability, [] rests upon the consent decree itself, not upon some independent admission of wrongdoing." 744 F.2d at 709. Plaintiffs are not challenging Delta's new policies per se; they they are simply insisting on a fulfillment of obligations owing to them because of Western's actions and the injunction remedying them. "[T]he disappearance by merger of a corporate employer . . . does not automatically terminate all rights of the [previous] employees . . .[;] the successor employer may [still] be required to arbitrate with the union under the [prior] agreement." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). Delta may be free to execute its own policies to other employees, but it is not free to abrogate its predecessor's obligations to plaintiffs under the injunction.[5]

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[5] Similarly, the Court of Appeals rejected Delta's argument that respondents needed to meet separately the criteria for injunctive relief (A. 5a):

> Delta's final argument, that petitioners must meet the criteria for injunctive relief, is misdirected; the real issue in this

Delta's attempt to circumvent these successorship principles is distinguished principally by a lack of candor. Delta argues that respondents were "unqualified" employees mounting an independent challenge to Delta's "presumptively lawful" downbidding policy. First, Delta's policy is not "presumptively lawful." In *Iervolino*, Delta raised numerous defenses and obtained a general verdict against a single plaintiff. In affirming the verdict, the Eleventh Circuit did not uphold, validate, or otherwise declare "presumptively lawful" Delta's downbidding policy. Second, respondents did not challenge Delta's policy, nor did they need to, because they were already working as flight engineers for up to six years and therefore were not seeking to downbid like the plaintiff in *Iervolino*.[6] Third, the successorship order here did not require Delta to "hire unqualified Western employees." Like the other 1,500 former Western pilots, respondents met all of Delta's job qualifications, except for the age barrier proscribed by the *Criswell* injunction.[7] Thus, this case simply

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case is whether successorship liability attaches. Because the merits of Criswell's claims have already been adjudicated, and because the obligation is preexisting, the plaintiffs need not make an independent showing for injunctive relief. Nor need they file a new action.

> That the new employer is not a party of the consent decree is of course irrelevant, for that is the whole point of the successorship doctrine. The question is whether the successorship doctrine applies and, if so, on what rationale.

Bates, 744 F.2d at 709.

[6] Although Delta argued in *Iervolino* that its policy was not age-based, here Delta applied it only to the 15 individuals who were age sixty. Delta did not apply the policy to bar the employment of any of Western's other 1,500 pilots, including numerous younger downbidding pilots. At Western, there were "hundreds of downbids in a wide variety of circumstances," *Criswell*, 514 F. Supp. at 392, including "two-step" downbids from Captain to flight engineer by pilots under age sixty. *Id.*

[7] The *Criswell* injunction barred Western from refusing to employ flight engineers "because of age" (S.A. 5a) and did not, as Delta

does not present the hypothetical facts urged in the petition concerning a challenge by unqualified employees to a policy that has been held lawful under prior court orders. Delta was far more candid about the limited scope and effect of the successorship order in describing the order to another court:

> That Order did not affect *any Delta* pilots or even other similarly situated former Western pilots. It is specifically limited to the 15 movants. More importantly, in that action, plaintiffs did not purport to challenge Delta's policy and the court did not hold that *Delta's* policy was unlawful. Accordingly, Delta's merger of Western into itself and the limited successorship finding with respect to 15 former Western pilots has no relevance to former Delta pilots or the presumptive lawfulness of Delta's independent policy.[8]

Stripped of its mischaracterizations, Delta's petition presents no issue of conflict among the Circuits in treatment of the successorship doctrine, either in the holdings of the courts or "in principle" (Pet. 12). Delta's attack on the factual successorship finding is merely an attempt to elevate the importance of Delta's policy above all other facts before the district court. Delta ignores the admonition by this Court that the successorship inquiry "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2236. Furthermore, the "successor doctrine is derived from equitable principles." *Musikiwamba*, 760 F.2d at 750; *see Bates*, 744 F.2d at 710-711. The court seeks to balance the pur-

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argues, force Delta to take on employees who "did not meet the acquiring company's independent experience, skill or even eyesight qualifications" (Pet. 10).

[8] September 28, 1987, "Defendant's Memorandum of Law in Opposition to Plaintiff's Application for Preliminary Injunction," *Owen v. Delta Air Lines, Inc.*, No. 3-86-1227-T (N.D. Tex.) at 11 (footnote omitted, emphasis in original).

poses of the underlying legislation—here the ADEA—with the legitimate interests and expectations of the affected employees and employer. *Bates*, 744 F.2d at 709. In making its successorship determination here, the district court balanced the interests involved by taking the *Iervolino* policy fully into account as one of the "equitable concerns," *Bates*, 744 F.2d at 711 (Tr. 40-41; *see id.* at 34-36), and by finding that Delta would suffer no significant harm or hardship from having to employ the respondents (A. 8a). In upholding the district court's factual findings, the Court of Appeals emphasized the limited scope of the successorship order and its lack of impact on the *Iverolino* policy. The Court of Appeals stated that "Delta need not change its up-or-out policy as it applies to others in order to accord relief to plaintiffs" (A. 4a), and concluded: "Delta may be free to execute its own policies to other employees, but it is not free to abrogate its predecessor's obligations to plaintiffs under the injunction" (A. 5a). Delta has presented no issue of novelty or importance that would warrant this Court's review of the "highly fact-specific enterprise" (A. 5a) of successorship determination in this case.

III. THE "CONTINUITY" FACTOR WAS PROPERLY APPLIED

The Court of Appeals' treatment of the "continuity" or "sameness" prong of the successorship test is fully consistent with the treatment given it by this and other courts, both in the context of the successorship doctrine as a whole as well as in the context of the narrow objections raised by Delta here. In advocating a mechanistic application of the continuity test, Delta disregards this Court's admonition that successorship is determined by the "totality of the circumstances." *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2237. Delta also disregards the two factors which are "critical to the imposition of successor liability," *Musikiwamba*, 760 F.2d at

750 (A. 3a-4a)—notice to the successor of the predecessor's obligation and the inability of the predecessor to provide relief—which were not in dispute in this case.

Delta argues that the Ninth Circuit's finding of continuity conflicts "at least in principle" with the decisions of other Circuits because the Court of Appeals picked the wrong date to apply the continuity factor. Again, Delta boosts its argument with a mischaracterization of the record. April 1, 1987 was not "the first day after the effective date of the expected acquisition" (Pet. 16). Delta and Western agreed to merge in September 1986 (C.R. 421(c) Exh. F at I-1). The merger was effective in December 1986 and Western was operated thereafter as a wholly-owned subsidiary of Delta until the merger was completed on April 1, 1987 (C.R. 425 at 2-3; A. 2a). Thus, April 1 was not the "beginning of a transition period" (Pet. 13), but rather was a date months after Delta acquired Western.

There is no authority to support the proposition that successorship determination should await some wholly arbitrary future date set by the acquiring company "after the dust settles" (Pet. 18). In duty-to-bargain successorship cases where the appropriate date to determine successorship has been in issue, the NLRB's "substantial and representative complement" standard has been approved in lieu of a "full complement" standard. *Fall River Dyeing & Finishing Corp.*, 107 S. Ct. at 2238; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985). The "complement" test is obviously important in the collective bargaining context, because the determination of the will of the majority may shift with changes in workforce composition. In the employment discrimination context, however, individual rights are at stake, so there is no reason to wait beyond the change in the employment relationship to determine successorship. In any event, even the "complement" tests were met here. By taking on virtually all Western employees,

Delta achieved both a "substantial and representative" and "full" complement of employees immediately after the merger.

Delta also argues that the Ninth Circuit incorrectly focused on the pilot group and flight operations, instead of "the overall operation of Delta's business after the acquisition" (Pet. 15). Delta's argument ignores the specific scope of the successorship inquiry here, which was limited to the employment of 15 pilots, and ignores this Court's acknowledgement that an employer may be a successor for some purposes and not others. *Howard Johnson Co.*, 417 U.S. at 249, 262 n. 9. Delta is also incorrect in asserting that the successorship finding was based "solely on the narrow factual conclusion" that the pilot seniority lists were not integrated (Pet. 15). As the Court of Appeals explained, continuity extended to the entirety of the carriers' flight operations (A. 4a).

CONCLUSION

For the foregoing reasons, Delta's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 1989

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-2184 AWT

CHARLES G. CRISWELL, ALBERT RON, RULON H. STARLEY,
Plaintiffs,

v.

WESTERN AIR LINES, INC.,
Defendant.

FINAL JUDGMENT AND PERMANENT INJUNCTION

[Filed May 12, 1981]

This action came on for trial before the Court and a jury and the issues having been duly tried and the jury having duly rendered its verdict and the Court having signed and filed its findings of fact and conclusions of law in the form of a memorandum opinion, pursuant to Rule 52(a), Fed. R. Civ. P.,

IT IS ORDERED, ADJUDGED AND DECREED:

A. *Money Judgments*

1. *Plaintiff Criswell.* The jury returned a verdict for Criswell and against defendant Western Air Lines, Inc. ("Western") in the amount of $50,393.87. This verdict

covers the 28-month period from August 1978 to November 1980. Criswell is awarded additional liquidated damages in a like amount of $50,393.87. Criswell is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46.

Recap of Damages Payable by Western to Criswell:

Actual pre-verdict damages	$ 50,393.87
Liquidated damages	50,393.87
Actual post-verdict damages	30,698.46
Total	$131,486.20

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $50,393.87 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

2. *Plaintiff Starley.* The jury returned a verdict for Starley and against Western in the amount of $52,088.94. Starley is awarded additional liquidated damages in a like amount of $52,088.94. Starley is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46.

Recap of Damages Payable by Western to Starley:

Actual pre-verdict-damages	$ 52,088.94
Liquidated damages	52,088.94
Actual post-verdict damages	30,698.46
Total	$134,876.34

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $52,088.94 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate

of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

3. *Plaintiff Ron.* The jury returned a verdict for Ron and against Western in the amount of $5,000. Because Ron has continued working pursuant to a preliminary injunction, no damage adjustment is necessary. He is, however, awarded additional liquidated damages in a like amount. The total money judgment in favor of Ron is $10,000. No prejudgment interest is awarded to plaintiff Ron.

B. *Equitable Decree.*

1. Plaintiffs Criswell and Starley shall immediately be reinstated as employees by Western under the following terms and conditions:

(a) Full seniority on the pilot seniority list, as of their respective, original dates of hire as pilots.

(b) Each such plaintiff shall be awarded a position as DC-10 second officer, either as was originally bid by him or any other position as to which plaintiff would have been entitled to have his bid awarded which was opened for bidding on or after each such plaintiff's retirement.

(c) Full salary reflecting each such plaintiff's seniority and position.

(d) In-house training customarily given by Western to DC-10 pilots downbidding or downgraded to DC-10 second officers.

(e) Western shall restore to the respective pension trusts all amounts paid under the Western-ALPA Fixed and Variable Pilot Pension Plans to plaintiffs Criswell and Starley. In satisfying the money judgments in favor of said plaintiffs, however, Western may offset all

amounts paid to them under the Variable Plan subsequent to November 1980.

2. Plaintiff Ron shall be continued in his employment by Western as a DC-10 second officer. He shall retain his position on the pilot seniority list.

3. With respect to all plaintiffs, Western:

(a) Shall continue to make regular, required contributions to the Pilots Variable Pension Plan for each plaintiff's account.

(b) Shall allow each plaintiff to elect whether or not to commence receipt of the benefits to which he is entitled under the Pilots Fixed Pension Plan retroactive to his sixtieth birthday or upon actual retirement. Said election shall be made within thirty (30) days hereof. If any plaintiff elects retroactive commencement of pension payments, all back payments shall be at seven percent (7%) interest from accrual to payment. If any plaintiff elects deferral to actual retirement date, his benefits shall be actuarially adjusted to reflect the shorter life expectancy resulting from such deferred commencement.

(c) May, until the first renewal of the Pilot Agreement, require, in addition to current medical certificates required by the Federal Aviation Administration, such further medical examinations as Western deems necessary or appropriate to enable it to discharge its responsibilities as a certificated air carrier. Such examinations shall be at Western's expense.

(d) Shall not require plaintiffs to retire and shall not discriminate against any of them in the terms, conditions or privileges of their employment for any reason based on age, prior to plaintiffs' respective seventieth birthdays.

4. Western, its officers, agents, servants, employees, and attorneys and all persons in active concert or par-

ticipation with it who receive actual notice of this Final Judgment and Permanent Injunction and Western's successors and assigns, are hereby permanently enjoined from:

(a) Refusing or failing to permit its flight deck crew members to work or continue to work as second officers after age 60 for any reason based on age.

(b) Refusing or failing to consider or act favorably upon downbids by captains or first officers for second officer positions for any reason based on age.

(c) Continuing to enforce its policy of requiring all flight deck personnel, including second officers, to retire at age 60.

(d) Any further violation of Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a).

The provisions of paragraph B.3 of this Final Judgment and Permanent Injunction shall apply to this paragraph 4.

5. Western shall require that its chief executive officer and all officers who have any responsibility over flight operations and flight deck personnel be furnished with a copy of and read part B of this Final Judgment and Permanent Injunction. Within 60 days of the date hereof, Western's chief executive officer or such other officer as may be delegated by him for this purpose, shall file and serve an affidavit of compliance, certifying that the provisions of this paragraph 5 have been complied with.

6. The Court reserves jurisdiction over this action to alter, amend, modify and enforce this Final Judgment and Permanent Injunction.

C. *Attorneys' Fees and Costs.*

Plaintiffs are awarded reasonable attorneys' fees, the amount of such award to be determined by an order after judgment, as provided in the memorandum opinion filed concurrently herewith.

Plaintiffs shall recover of defendant their costs of suit.

Dated: May 12, 1981

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge